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IN THE COURT OF COMMON PLEAS OF FULTON COUNTY, OHIO

Stammco, LLC, d.b.a., The Pop Shop, et al,	*	
Plaintiff,	*	
-vs-	*	Fulton Co. Case No. 05CV000150
United Telephone Company of Ohio,	*	**JUDGMENT ENTRY**
d.b.a., United Telephone Co.,et al,	*	
Defendant.	*	

* * * * *

Case Background

Plaintiffs have brought their suit against their local and long distance telephone service provider, UTC, seeking relief from the imposition of third-party unauthorized charges, a practice known as "cramming." Plaintiffs now seek to prosecute their action, along with others similarly situated, as a "class," and they are seeking authorization to purse this collective action against the Defendant, and its affiliated companies. The initial step in seeking this type of relief is to formulate a proper definition of the "class" to be certified, a proffer of which the Plaintiffs had submitted in their initial pleadings. In its initial Judgment Entry this Court did certify the Plaintiffs proposed class definition, as follows:

"All individuals, businesses or other entities in the State of Ohio who are or who were

Courts, as a "Class."

The Court will initially address the "Error" assigned by the Supreme Court. The ultimate conclusions to be drawn by the Parties, from the Supreme Court's pronouncement on class definition error, differ greatly, in that the Plaintiffs aver the errors are "procedural," being mechanical and grammatical, while the Defendant contends them to be "substantive," and thus dispositive. The Court will attempt to reexamine anew the class definition resubmitted by Plaintiffs, the alternate arguments raised by the litigants, and the pertinent statutory and case law.

Plaintiffs have proposed the revised definition of the proposed class to be as follows:

"All individuals, businesses or other entities in the State of Ohio who are or who were within the period four years prior to the initiation of this lawsuit to the present, subscribers to local telephone service from United Telephone Company of Ohio d.b.a. Sprint and/or any successor company providing that same service, and who were billed for third party charges as to which sprint had no prior authorization from the customer in writing or by a method acceptable to Sprint sufficient for Sprint to verify that the customer had agreed to such charge. Excluded from the class are those customers who subscribed to and provided authorization for long distance services from a provider of toll services that were billed on the customers' local telephone bills. Also excluded from this class are defendants, their affiliates (including parents, subsidiaries, predecessors, successors, former and future employees, officers, directors, partners, members, indemnities, agents, attorneys and employees and their assigns and successors."

Unfortunately for Plaintiffs this Court must come to the following conclusions:

(1) That the "class definition," as submitted by the Plaintiffs is a prohibited "fail-safe class;"

improved probability of those providers being able to recoup the small fees charged, for those services, since Defendant Sprint/Embarq/Century Telephone, the Local Exchange Carrier, (LEC) incorporates those fees within the aggregated bill sent to the customer.

The problem comes about when that "small fee" is not authorized, or is erroneous in some respect. Combating a small erroneous charge is an almost impossible task for the average customer. If the customer refuses to pay for a certain third party service, even if he did not contract for it, or authorize it, then the entire telephone service could or would be disconnected, or discontinued, or the charges could or would be rolled over "ad infinitum." The customers know this. As currently structured, even if a customer is convinced that a charge is fraudulent, or incorrect, and he or she wishes to contest that portion of his/her bill, then the burden is still upon him/her to prove this. This assumes that he or she is given a real opportunity to do so. In reality that task of garnering "proof" may be difficult to do if he/she is effectively shuffled around, to and from numerous overseas call centers, whose customer service representatives vaguely understand English, or the caller is shifted to a number of levels of prerecorded messages that tend to be interminable, and interspersed with long stretches of "elevator music." The enormous time, energy, and patience expended quickly eclipses any satisfaction to be derived from an eventual recoupment of a few dollars or cents.

Further, if a customer cannot prove the fraudulent or inaccurate nature of the charges to the Defendant's, and the third party service provider's satisfaction, then the charges will merely be rolled over onto the customer's next month's bill. If the telephone company insists that the customer must resolve any issue involving an alleged mistaken charge from the third party provider, with that provider, before it can remove that charge from the bill, then the customer is left with the prospect of dealing with a company that may or may not be predisposed to assist him/her, because they are

horoscopes, or email accounts. Consumers often do not notice or understand these charges when they appear on the telephone bills, and they may simply pay them without realizing that they are for services the consumer did not request or authorize, or they may simply pay them to avoid further aggravation and greater expenditures. (See *Franchising 2010, 993 PLI/Pat 645, 647 (2010)*.

Local exchange carriers or "LECs" dominated the telephone service market after the AT&T breakup starting in 1982. See United State v. American Tel. & Telegraph Co., 552 F.Supp. 131, 227 (D.D.C. 1982); 47 C.F.R. Sec. 702, et. seq. When the Federal Communications Commission began detariffing LEC's services, and their party service providers entered the market, the billing and collection from the third party providers sometimes morphed, whereby the exploitation of unsophiticates, predicated upon this nefarious billing procedure, began. The FCC's detariffing of the LEC's billing and collection services gave rise to a peculiar form of commerce, founded upon third party exploitation by use of this uncommon payment method, for things other than telephone usage. (See In re Matter of Detariffing billing & Collection. 102 F.C.C. 2d 1150 (1986). *Fed. Trade Commission* No. 310CV0022, 2010 WL 2849424.)

Common Law and Equity

At common law, a person who accepts a service, and subsequently pays for it, has, in effect, ratified the contract, and fully performed the obligations adhering to it. If, however, a person is induced to pay a charge, by adhesion, fraud, or deceit, for a service he/she did not contract for, or did not get, then that person is not bound by that contract. One cannot assent to a fraudulent contract. Therefore, by laws and common sense, anyone who is injured in a fraudulent transaction, whether he or she is unknowingly or knowingly injured, is within his or her right to have that injury made known, and to pursue a claim in a Court of Law and Equity.

as the initial point of contact between third-party providers and the customer, it has blurred the lines of the relationship, as perceived by the consumer of their services. United Telephone has indicated it has been able to resolve some customer complaints made against third-party providers. However, in the customers mind, this lends further credence to Plaintiffs' assertion that this establishes proof of a relationship of "implied authority," if not "agency." All these points merit serious consideration, and they do marshal substantial evidence in support of a ruling that would favor a finding in favor of class certification.

Legal Analysis of Statutory and Case Law

Justice Cupp appeared to have an appreciation of the issues in this case, when he stated in his concomitant Concurrence and Partial Dissent, "I would address this proposition of law and hold that the Trial Court did not abuse its discretion in determining that class wide questions predominate." Stammco, LLC v. United Tel. Co. Of Ohio, 125 Ohio St. 3d 91, 2010-Ohio-1042, 926 N.E. 2d 292, at Paragraph 27.

While this was a minority endorsement that class wide questions predominate, the majority did not concur regarding this matter, and therefore this Court must reconsider the underlying law.

The first Error found by the Court concerns aspects of a readily identifiable class of members, which appears to be founded upon the fundamental second Error, where this Court accepted the Plaintiffs' broadly construed aspects of "authorization," i.e., "their permission." This Court does agree with the Supreme Court, that without specifically defining from whom authorization was required, and to whom it must be given, then the relative litigant's position must remain declared as "indeterminate."

Simply put the "their" of "their permission," refers to customers who received bills from

12 Ohio St.3d 230, 233, 12 OBR 313, 466 N.E. 2d 875. "However, a trial court may consider any evidence before it at that stage of the proceedings which bears on the issue of class certification." Senter v. General Motors Corp. (C.A.6, 1976), 532 F.2d 511, 523. (Also Hansen v. Landaker (Dec. 7, 2000), Franklin App. No. 99AP-1117,2000 Ohio App. LEXIS 5680 at Paragraph 6, 2000 WL 1803936 at Paragraph 8).

Here Plaintiffs have proffered a new definition that attempts to address the Supreme Court's concern for "consent" and "authorization." The case of Global Crossing Telecomms, Inc. V. Metrophones Telecomms, Inc. (2007), 550 US 45, 49, appears to address this matter by giving the customer/consumer rights advocate a right to redress injuries suffered from the "carrier's charges." The "class" definition submitted by Plaintiffs here assumes that all charges appearing on the telephone bill are the "carrier's," or that their injuries arise as a direct result of the "carrier's" practices or regulation. But Defendant asserts the charges are not "theirs," but the Third Party Providers. To cite from another Opinion, "Section 203(a) of the Communications Act requires all common carriers to file with the FCC schedules, also known as tariffs, setting forth its charges and showing the classifications, practices, and regulations affecting such charges. 47 U.S.C. Section 203(a)." Splitrock Props., Inc. v. Qwest Commc'ns Corp. (D.S.D. Aug. 28, 2009), No. Civ. 08-4172, 2009 WL 2827901, at Paragraph 2.

Plaintiffs have not asserted a claim that the proposed class definition should include matters regarding the practices and regulatory relationship existing by and between United Telephone and its third party service providers. A Discovery Motion, prior to the filing of the Class Certification Motion, might have been in order to first establish whether United Telephone had filed a schedule with the FCC. The Motion might have established the mode of practices and regulations regarding

to the Ohio Supreme Court in this case indicate that this was an issue that was considered by the Justices to be of paramount importance, and even determinative.

"Fail-safe" issues relate back to an Enactment passed by Congress some six years ago, designated as the "Class Action Fairness Act," which was purportedly passed to give broad protection to large corporations who were being peppered with numerous "peccadillo" suits, that were allegedly causing an unreasonable sap of the economic strengths of these behemoths. The Washington Legal Foundation has authored and published an excellent article on the subject in its "Legal Backgrounder," Vol. 24, at page number 38, where the concept is briefly discussed, and explained in comprehensive terms.

To capsulize the matter, a class definition is considered to be impermissible, as a "fail-safe" class, or as a "one-way intervention" class, where and because the definition based class membership turns on the ability to bring a successful claim on the merits. Courts have generally held that such a definition is inconsistent with requirements of Civil Rule 23(c)(3), which provides in part that a judgment, adverse to the class, would bind all class members, and thus there would not exist any generalized evidence which could prove or disprove an element, "on a simultaneous, class-wide basis." (See Amati v. City of Woodstock, 176 F.3d 952 (7th Cir. 1999), and Cope v. Metropolitan Life (1998), 82 O.St. 3d 426). These holdings indicate a class definition must not result in a "fail-safe" class which, "would be bound only by a judgment favorable to Plaintiffs, but not by an adverse judgment." Adashunas v. Negley, 626 F.2d 600, 604 (7th Cir. 1980), citing Dafforn v. Rousseau Associates, Inc., 1976 WL 1358, Paragraph 1 (N.D.Ind. 1976); La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 467 (9th Cir. 1973). Hence, in class action litigations, Plaintiffs are now required to present a posture that walks a very tight line, on a continuum between a predominance of the

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attempt to obtain a redress through an escalade of telephone calls routed through call centers in India and Pakistan, without a lot of satisfaction. Nevertheless it appears that there is a precedent for this type of situation, which has been long recognized and encapsulated by the Latin phrase: "Damnum absque injuria." Unfortunately this Court does not have the wherewithal, nor the authority to address Plaintiffs' situation. A higher Court than this one will have to address the issue, with some decorum, common sense, and finality.

For all of the foregoing reasons, this Court must reluctantly find that the Plaintiffs have not met their burden of establishing, by a preponderance of the evidence, that a "class certification," is a proper one. Therefore, Plaintiff's Amended Motion for Class Certification, is hereby found not to be sustained, and it is hereby denied and dismissed, without prejudice.

IT IS SO ORDERED.

THIS IS A FINAL, APPEALABLE ORDER.

Hon. James E. Barber

cc: Dennis Murray, Sr., Esq.
Donna Evans, Esq.
Michael Farrell, Esq.
Karl Fanter, Esq.

This is a Final Judgement
To the Clerk: Serve all parties not in Default with "Notice" of this Judgement, and "Date of its Entry upon the Journal."

James E. Barber, Judge

Copies Served 12/23/20 10
Paul E. MacDonald, Clerk
By CW